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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 343

OSCAR W. EHRHORN,

Petitioner,

v.

INTERNATIONAL MATCH REALIZATION COMPANY, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated, October 11, 1951

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Abbreviations Used in this Brief

Court below:	Court of Appeals for the Second Circuit.
District Court:	United States District Court for the Southern District of New York.
Ex.	Exhibit.
R.	The printed record in this Court.

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INTERNATIONAL MATCH REALIZATION COMPANY, LTD.,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent files this brief in opposition to the petition of Oscar W. Ehrhorn for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit which affirmed a judgment reopening the bankrupt estate of International Match Corporation and directing the petitioner to repay excess commissions withdrawn from the estate in violation of a standing rule of the District Court.

Opinions Below

Court of Appeals—*Ehrhorn* v. *International Match Realization Company, Ltd.*, 190 F. 2d 458 (C.A. 2nd 1951); (R. 292).

District Court —The opinion of the District Court is not reported (R. 143). The District Court confirmed the amended report of the Special Master which contains a full statement of the case and the findings and conclusions upon which the judgment of the District Court was based (R. 56-103, 146).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Section 24c of the Bankruptcy Act (11 U.S.C.A. §47c) and Section 1254(1) of the Judicial Code (28 U.S.C.A. §1254(1)).

POINT I

The petition presents no question of general importance.

The petition presents seven questions which the Court is asked to decide (Petition, pp. 2-3).

Question No. 1 is purely a question of fact as to whether or not the Judges of the District Court adopted the so-called standing rule limiting the compensation of the referees. Petitioner has failed to include in the record filed in this Court all of the evidence which supports

finding No. 4 (R. 93).* No attempt is made in the petition to show that finding No. 4 is contrary to the clear weight of the evidence. This finding, concurred in by the Court below, will be accepted by this Court without re-examination of the evidence in accordance with the two-court rule.

> *Page* v. *Arkansas Gas Corp.*, 286 U. S. 269, 271 (1932);
> *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367 (1942).

Five of the questions revolve about a statute and standing rule of the District Court which are no longer in effect. (Questions 1, 2, 3, 6 and 7, Petition, p. 3.) The statute (Section 40a of the Bankruptcy Act), as in effect during the period May 1933 to July 1, 1947, provided that the referees in bankruptcy were to be compensated by commissions on distributions to creditors. (11 U.S.C.A. §68a; Appendix hereto, p. 8.) The standing rule limited the compensation of referees of the District Court to $20,000 per annum (R. 191). As of July 1, 1947 the Referees' Salary Act of June 28, 1946 amended Section 40a by eliminating the commission basis of compensation and placing the referees on a salary (11 U.S.C.A. §68a; Appendix hereto, p. 8). Thus, these five questions involve

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* Petitioner's Ex. 8, the transcript of proceedings before the District Court in the *Warner Sugar Company* case. The findings made on petitioner's statements in that case were sustained in *Ehrhorn* v. *Quillinan*, 170 F. 2d 890 (C.A. 2nd 1948) (R. 180). Petitioner's Ex. 9, the semi-annual reports made to the District Court showing a consistent reporting of compensation over a number of years at approximately $20,000 per annum (R. 61-62, 103, 181). Petitioner's Ex. 12, the account books of petitioner, which fail to fully disclose his receipt of excess commissions (R. 62-64, 103, 190). These exhibits were all a part of the record in the Court below (R. 281). Although the petitioner has formally denied that there was a standing rule, he has in substance conceded finding No. 4 (Par. 5 of the petition [R. 6] and par. 15 of the answer [R. 24]; R. 196-200).

only matters of historical interest. It is most unlikely that any such questions will arise in the future. They are of no consequence in the present-day functioning of the bankruptcy courts.

The remaining questions, Nos. 4 and 5, relate to the procedure for the reopening of an estate in bankruptcy and to the summary jurisdiction of the court. As we shall attempt to show in Point II of this brief, these questions were decided by the Court below in accordance with established principles. Thus they present no important issues which need to be settled by this Court.

POINT II

No conflict of decisions is presented by the petition.

In Points II and III of the argument in support of the petition, it is asserted that the District Court was without jurisdiction to pass upon the merits of the controversy prior to the reopening of the estate and that the District Court could not adjudicate the matters in controversy in summary proceedings (Petition, pp. 14-16; see Questions 4 and 5, Petition, p. 3). Petitioner relies on *In re Schwartz,* 4 F. 2d 895 (C.A. 2nd 1925), *In re Graff,* 250 Fed. 997 (C.A. 2nd 1918), *In re Leigh,* 272 Fed. 678 (C.A. 7th 1921), cert. den. *sub nom. Chicago Railway Equipment Co.* v. *Laughlin,* 256 U. S. 698 (1921), and *Harrison* v. *Chamberlin,* 271 U. S. 191 (1926).

As indicated by the Court below, petitioner misconceives the nature of these proceedings (R. 294). The power to act in summary proceedings is not only granted by the Bankruptcy Act but is one of the inherent powers of the court (R. 294, 86-88). As an officer of the court exercising judicial functions, the petitioner occupied a position similar to that of a fiduciary, particularly with respect

to matters affecting his personal interest. Indeed, we think the obligations of the petitioner as a referee in bankruptcy were greater than those of the ordinary fiduciary because of the greater power and authority vested in him. He attempted to exercise his powers as referee—powers which he held in trust—for his own personal benefit. He violated his obligations to the court and interfered with the administration of the International Match Corporation estate by the court. The authorities relied on by the Court below indicate clearly that the District Court had power to protect itself, the property in its custody, and the creditors, and in doing so, to proceed summarily (R. 294).

The bankruptcy court had the power to proceed *sua sponte*. It was unnecessary that there be a petitioner (R. 294).

The powers of the court, which are upheld by the decision below, are essential to the preservation of the integrity of the court. These powers were exercised by the District Court with due regard to the petitioner's right to a fair trial. The petitioner availed himself of his opportunity to be heard to the extent that it suited his purposes (R. 174-6, 192, 194-200, 221-226, 234).

It should be noted that in the *Graff* case, *supra*, decided by the Court below, it was held that the facts did not justify a reopening. In the *Schwartz* case, *supra*, there was no attempt to invoke the jurisdiction of the bankruptcy court by a petition to reopen the estate. Since these cases were decided, Section 2a(8) of the Bankruptcy Act has been amended to permit reopening of estates "for cause shown".* The *Leigh* case, *supra*, merely holds that the court need not adjudicate the ultimate issues in granting

* 11 U.S.C.A. §11a(8). Prior to the 1938 amendment to Section 2a(8) it was necessary to show that the estate had been "closed before being fully administered" in order to obtain a reopening.

a petition to reopen. The extent of proof required to justify the reopening of a bankrupt estate is clearly within the discretion of the bankruptcy court. In citing *Harrison* v. *Chamberlin, supra,* the petitioner incorrectly assumes that these are turnover proceedings (R. 295).

POINT III

The standing rule did not violate General Order 56.

It is contended in Point I of the argument in support of the petition that the standing rule violated General Order 56 (Petition, pp. 14-15, 11 U.S.C.A. foll. §53, Appendix hereto, p. 9). This General Order, which became effective on February 13, 1939, is patterned after Rule 83 of the Federal Rules of Civil Procedure. The standing rule was announced in May 1933 (R. 191), long before the promulgation of General Order 56. The Chandler Act amendment to Section 40a of the Bankruptcy Act, which became effective on September 22, 1938, granted specific authority to the bankruptcy courts to limit the compensation of the referees by "standing rule or otherwise" (11 U.S.C.A. §68a). Congress had been advised of the standing rule in the District Court at the hearings before the House Committee on the Judiciary in June 1937. (See Report of Hearings on H. R. 6439 before the House Committee on the Judiciary, 75th Congress, 1st Session, June 1937, pp. 88-90.) It seems clear that one of the purposes of the amendment to Section 40a was the ratification of the standing rule here in question.

Since the standing rule was promulgated prior to the effective date of General Order 56, there was no obligation to furnish a copy of the rule to the Supreme Court of the United States. The last sentence of General Order 56 requires only that copies of rules be supplied "upon

their promulgation". This is the construction given to similar language contained in Rule 83 of the Federal Rules of Civil Procedure. *Zeth* v. *Penna. R. Co.*, 7 F.R.D. 612 (D.C. Penna. 1947).

Moreover, the standing rule was not a rule governing "practice" within the meaning of the General Order. See *Kellman* v. *Stoltz*, 1 F.R.D. 726, 728 (D.C. Iowa, 1941); *State* v. *Frazier*, 36 Oregon 178, 59 Pac. 5 (1899).

The petitioner had knowledge of the standing rule (R. 191). He was not prejudiced by failure to furnish a copy of the rule to the Supreme Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Dated, October 11, 1951.

APPENDIX

Bankruptcy Act

During the period May 1933 to September 22, 1938, the pertinent provisions of Section 40a of the Bankruptcy Act read as follows:

> "Referees shall receive as full compensation for their services, payable after they are rendered, a fee of * * *; and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustees * * *." (11 U.S.C.A. §68a)

The Chandler Act added the following sentence at the end of Section 40a, effective on September 22, 1938:

> "The judge may, however, by standing rule or otherwise, fix a lower rate of compensation, so that no referee shall receive excessive compensation during his term of office, * * *." (11 U.S.C.A. §68a)

The Referees' Salary Act of June 28, 1946 amended Section 40a to read as shown below. This amendment became effective on July 1, 1947.

> "§40a. Referees shall receive as full compensation for their services salaries to be fixed by the conference, in the light of the recommendations of the councils, made after advising with the district judges of their respective circuits, and of the Director, at rates not more than $10,000 per annum for full-time referees, and not more than $5,000 per annum for part-time referees. In fixing the amount of salary to be paid to a referee, consideration shall be given to the average number and the types of, and the average amount of gross assets realized from, cases closed and pending in the territory which the referee is to serve, during the last preceding period of ten years, and to such other factors

as may be material. Disbursement of such salaries shall be made monthly by or pursuant to the order of the Director." (11 U.S.C.A. §68a)

General Order 56

This General Order was added on January 16, 1939 and became effective February 13, 1939.

"56.—Rules by Courts of Bankruptcy.

"Each court of bankruptcy, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be furnished to the Supreme Court of the United States and the Administrative Office of the United States Courts." (11 U.S.C.A. foll. §53)

The last nine words were added by amendment of June 23, 1947, effective July 1, 1947.